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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

FEDERAL TRADE COMMISSION, STATE
OF ARIZONA, STATE OF CALIFORNIA,
DISTRICT OF COLUMBIA, STATE OF
ILLINOIS, STATE OF MARYLAND, STATE
OF NEVADA, STATE OF NEW MEXICO,
STATE OF OREGON, and STATE OF
WYOMING,

Case No.: 3:24-cv-00347-AN

DEFENDANTS THE KROGER
COMPANY'S AND ALBERTSONS
COMPANIES, INC.'S RESPONSE TO
PLAINTIFFS' MOTION FOR AN
EXTENSION OF TIME

Plaintiffs,

v.

THE KROGER COMPANY and
ALBERTSONS COMPANIES, INC.,

Defendants.

RESPONSE

Plaintiffs' Motion for an extension of time (ECF No. 139) ("Extension Motion") to respond to Defendants' Motion to Compel (ECF No. 133) fails to provide this Court with the relevant background or underlying context of Plaintiffs' Motion. For the following reasons, this Court should grant the motion only in part and allow a one-day extension to respond to Defendants' Motion, consistent with the extension that Plaintiffs proposed several days earlier and to which Defendants have already agreed.

First, Plaintiffs' Extension Motion is inconsistent with the Case Management and Scheduling Order ("CMSO"), which the parties agreed to after extensive negotiations, and which this Court entered. ECF No. 88. The CMSO sets out a deliberate procedure for addressing discovery disputes that reflects the highly-accelerated nature of this litigation and the abbreviated fact discovery period. *Id.*, Section B.17. To ensure expedient briefing and resolution of discovery disputes, the CMSO requires to parties to meet and confer within three calendar days of a request to discuss a dispute and to seek relief within five calendar days of reaching an impasse. *Id.* The CMSO further provides: "Any brief in opposition to the motion shall be filed no later than two calendar days after the motion was filed." *Id.* The Parties agreed this was the appropriate sequence and timing for addressing discovery disputes that arise in this litigation, and Plaintiffs have not provided any declaration or other evidentiary support to depart from that governing rule.

Second, Plaintiffs received ample notice of the legal bases for Defendants' Motion to Compel. Defendants conferred with Plaintiffs about their deficient interrogatory responses early last week on May 14, 2024—five days before Defendants filed their motion to compel. Plaintiffs were placed on notice that Defendants may seek relief if Plaintiffs refused to provide supplemental responses as intended by the CMSO. *See* Casey Dec., Ex. A at 5. Over the next several days,

Defendants requested several times that Plaintiffs provide their position on Defendants' intention to request an expedited hearing (as required by Local Rule 7-1(g)). *Id.* at 2–5. Defendants also twice reminded Plaintiffs that the briefing of a motion to compel would be governed by the deadlines in the CMSO. *Id.*

Third, Defendants agreed to a one-day extension consistent with Plaintiffs' previous proposal, and Plaintiffs provided no basis for their renewed request. Specifically, on Friday, May 17, 2024, Plaintiffs asked for three days to respond to the forthcoming motion to compel if Defendants filed that day—*i.e.*, Plaintiffs would respond on Monday if Defendants filed by 5 p.m. on Friday—but Defendants informed them as a courtesy that they did not plan to file the motion to compel that day. Casey Dec., Ex. A at 2–3.

After Defendants filed their motion to compel on May 19, 2024, Plaintiffs reached out requesting *four days* to respond—even more time than they sought when they were concerned Defendants would file on Friday and make the entire two-day response period fall in the weekend. In doing so, Plaintiffs' counsel offered no explanation for why Plaintiffs were unable to meet the agreed-upon deadline in the CMSO despite five days' notice of the narrow dispute, let alone why they now needed an even longer extension than previously proposed. Casey Dec., Exs. B, C. Defendants nonetheless offered to honor the three-day response period consistent with Plaintiffs' original request. *Id.* Plaintiffs opted to file this motion instead.

Fourth, time is of the essence, and Defendants will be prejudiced by any further delay. Defendants have been more than willing to grant courtesies where it does not prejudice their defense in this litigation. For example, on April 24, 2024, Defendants informed the FTC that it had failed to provide its responses and objections to Defendants' requests for production by the deadline specified in the CMSO. Casey Dec., Ex. D at 2. Without even being asked, Defendants

informed the FTC that they would hold open the period to object as a courtesy. *Id.* With 21 days remaining in the discovery period ending June 11, 2024, however, Defendants cannot allow Plaintiffs to draw this process out in spite of the deadline they agreed would govern discovery motions in the CMSO. Defendants were entitled to the critical market-related information sought in their interrogatories more than a week ago—when Plaintiffs served their deficient responses—and even an order compelling Plaintiffs to provide that information would allow Plaintiffs yet another seven days to respond under the CMSO. ECF No. 88, Section B.17. Indeed, while Plaintiffs had the benefit of more than a year of investigation prior to filing the Complaint, Defendants are forced to extract the discovery they need to effectively defend themselves entirely within the confines of this action. Every single day is valuable to Defendants as the discovery period ticks away.

CONCLUSION

The Court should permit Plaintiffs three days to respond to Defendants' motion to compel as Plaintiffs originally proposed and to which Defendants agreed.

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